1986

The State of Utah v. Rick N. Pursifell : Brief of Respondent

Utah Supreme Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860361-CA
v.	:	
RICK N. PURSIFELL,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION BURGLARY, A SECOND DEGREE FELONY; ATTEMPTED BURGLARY, A THIRD DEGREE FELONY; 2 COUNTS OF THEFT, CLASS B MISDEMEANORS. IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING.

DAVID L. WILKINSON
Attorney General
SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

WALTER F. BUGDEN, JR.
The Judge Building
No. 8 East Broadway
Suite 426
Salt Lake City, Utah 84111

STEVEN HANSEN
800 Boston Building
Salt Lake City, Utah 84111

Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860361-CA
v.	:	
RICK N. PURSIFELL,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION BURGLARY, A SECOND DEGREE FELONY; ATTEMPTED BURGLARY, A THIRD DEGREE FELONY; 2 COUNTS OF THEFT, CLASS B MISDEMEANORS. IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING.

DAVID L. WILKINSON
Attorney General
SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

WALTER F. BUGDEN, JR.
The Judge Building
No. 8 East Broadway
Suite 426
Salt Lake City, Utah 84111

STEVEN HANSEN
800 Boston Building
Salt Lake City, Utah 84111

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	Case No. 860361
RICK N. PURSIFELL,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF ISSUES

1. Did the trial court err in refusing to appoint substitute counsel where Defendant failed to articulate a conflict of interest, a complete breakdown of communication or an irreconcilable conflict?

2. Was trial counsel ineffective for failing to make or choosing not to make certain objections or pretrial motions?

JURISDICTION

This appeal is from convictions of burglary, a second-degree felony; attempted burglary, a third-degree felony; 2 counts of vehicle burglary, class A misdemeanors; and 2 counts of theft, class B misdemeanors. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987).

STATEMENT OF THE CASE

Defendant, Rick N. Pursifell, was charged with burglary, a second-degree felony; attempted burglary, a third-degree felony; 2 counts of vehicle burglary, class A misdemeanors; and 2 counts of theft, class B misdemeanors.

Defendant was convicted of the charged offenses in a jury trial held May 29, 1986, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, presiding. Judge Frederick sentenced defendant on June 2, 1986, to the statutory terms on all six counts to run concurrently with each other but consecutively to a 0 to 5 term imposed in a prior conviction.

STATEMENT OF FACTS

Respondent accepts the Statement of Facts presented in Appellant's brief.

SUMMARY OF ARGUMENT

I. The trial court properly refused to appoint substitute counsel where defendant did not demonstrate a conflict of interest, a complete breakdown of communication or an irreconcilable conflict when the trial court gave him the opportunity to articulate his reasons for displeasure with counsel. When the court decided not to appoint alternate counsel, it was not required to ask defendant if he wanted to proceed pro se or inform him of that right. It was defendant who should have requested that he be allowed to represent himself for the court was not required to presume from his general request for substitute counsel that defendant wanted to waive counsel.

II. Trial counsel was not ineffective merely because she could have made objections that she chose not to make or overlooked. Because none of the matters complained of by defendant prejudiced him, counsel's performance reached at least the minimum requirements of competent counsel who identified with defendant and his defense.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO APPOINT A DIFFERENT DEFENSE ATTORNEY

Defendant was represented at trial by Frances Palacios of the Salt Lake Legal Defenders Association. On the first day of trial, defendant expressed displeasure with Ms. Palacios stating that he did not "wish to proceed with Ms. Palacios..." but not specifying what he wished to do in the alternative. Judge Frederick questioned defendant about the matter and determined that Ms. Palacios would continue representing defendant. On appeal, defendant argues that he should not have been forced to proceed with unacceptable counsel, that the trial court did not inquire into his objection thoroughly, and that the court did not inform him of his option to proceed pro se. Therefore, he asserts, the court violated his Sixth Amendment right to counsel and committed reversible error. As argued below, the trial court's decision was correct and defendant is not entitled to reversal of his conviction.

At the outset, the State agrees that a criminal defendant has the right to appointed counsel if indigent, the right to self representation and the right to effective counsel as defendant notes. See e.g. State v. Wood, 648 P.2d 71, 91-92 (Utah 1981). The issue here is not whether defendant was entitled to these rights, but whether the action of the trial court in continuing Ms. Palacios as defense counsel denied defendant any of these rights.

Defendant suggests that the trial court should have appointed new counsel for him when he expressed his displeasure with counsel's performance. However, even the cases cited by defendant do not support his claim. These cases indicate that a defendant seeking substitute counsel must show good cause for the replacement, People v. Walker, 133 Cal. Rptr. 520, 555 P.2d 306 (1976); McKee v. Harris, 649 F.2d 927 (2nd Cir. 1981), and that the trial court must inquire into the basis for the defendant's claims, United States v. Hart, 557 F.2d 162 (8th Cir. 1977); White v. White, 602 F. Supp. 173 (W.D.Mo. 1984); Smith v. State, 651 P.2d 1191 (Alaska Ct. App. 1982); United States v. Welty, 674 F.2d 185 (3rd Cir. 1982).

The trial court in this case did inquire into the cause of defendant's displeasure with counsel (R. 97) and defendant did not establish good cause for replacing Ms. Palacios. Defendant merely complained that counsel did not tell him about a hearing on a discovery motion before the hearing date and stated that he thought she should have told him about the discovery request and the hearing prior to filing it (R. 97-99).[1] This complaint did not establish that defendant and defense counsel were "embroiled in irreconcilable conflict" requiring appointment of new counsel. See Wood, 648 P.2d at 92. What was established was that defendant did not understand the discovery process and the result was that defense counsel, the prosecutor, and the judge explained

---

[1] Notably, there was no hearing on defendant's discovery request because the State provided everything defendant requested prior to the hearing date. (R. 99-100.)

to defendant what occurred during discovery. Defendant did not allege that the discovery request was inadequate or the response incomplete nor did he complain about counsel's pre-trial investigation nor her preparation for trial nor her proposed trial strategy. In fact, defendant did not even hint at anything that would have alerted the court to complaints other than the discovery complaint he expressly articulated. Defendant clearly failed to establish a "conflict of interest, a complete breakdown of communication or an irreconcilable conflict" and was not, therefore, entitled to substitute counsel. McKee, 649 F.2d at 931, quoting United States v. Calabro, 467 F.2d 973, 986 (2nd Cir. 1972).

Defendant, however, would also require that the trial judge must go further and inform him that in lieu of proceeding with counsel, he may choose to represent himself. The case defendant cites for this proposition does not inflict such a stringent rule. United States v. Welty, 674 F.2d 185 (3rd Cir. 1982), aside from holding that a trial judge must make "at least some inquiry as to the reason for the defendant's dissatisfaction," also states that once the inquiry is complete and the request denied, "the court can then properly insist that the defendant choose between representation by his existing counsel and proceeding pro se." Id. at 187-188. Welty does not stand for the proposition that a court must in something analogous a Miranda-type warning inform defendant of his right of self-representation. This is clear when the facts of Welty are examined. There, Welty asked the court to allow him to seek

private counsel to replace appointed counsel or to proceed pro se. The court, believing this was a delaying tactic, told Welty he could keep appointed counsel or proceed pro se without asking about the basis of the request and without explaining the dangers of representing oneself.

The Third Circuit in making the statements quoted above was merely pointing out that a defendant could not be forced to make the choice Welty made without the trial court first determining by inquiry that there was no reason to appoint substitute counsel. In this case, defendant was allowed to state the reason for his unhappiness with appointed counsel as required but, significantly, defendant never requested to represent himself. Thus, the court was not required to warn him of the dangers inherent in self-representation nor was it required to address the question of self-representation at all where defendant never raised the issue.

In a similar case, the Fifth Circuit required a criminal defendant to explicitly inform the trial court that he wished to proceed pro se clearly and unequivocally before the trial court must consider that option. Moreno v. Estelle, 717 F.2d 171, 174 (5th Cir. 1983). The court stated:

> Moreno's stated reasons for this request were that his counsel had failed to carry out certain unspecified requests and that she was not "helping" him; not that he wished to act as his own attorney. We cannot infer from the defendant's general request to the court to dismiss his attorney that he desired to waive counsel and continue the trial pro se. Nor does the trial judge have an obligation to personally inform the defendant of his right to represent himself in such circumstances.

Id. at 175 (citation omitted).

Because the trial court made a proper inquiry into the reasons for defendant's request for substitute counsel and because defendant's reason was insubstantial, the trial court here properly denied defendant's request. Moreover, the trial court was not required to offer defendant the alternative of proceeding pro se. Consequently, the trial court's ruling should be upheld and defendant's conviction affirmed.

POINT II

DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that trial counsel was ineffective because she "barely presented a defense." He enumerates defense counsel's alleged failings as: (1) not objecting to hearsay evidence; (2) not objecting to a witness' reference to another "robber"; (3) no pretrial challenge to defendant's initial detention; (4) no pretrial motion to suppress the show-up identification of defendant as suggestive; (5) not questioning why no fingerprints were taken; and (6) failure to impeach a witness with a prior inconsistent statement. Based upon counsel's alleged ineffectiveness, defendant requests a new trial.

Regardless of defendant's complaints, counsel's performance in this case was, nevertheless, constitutionally sufficient under the applicable standards.

> [T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.

Engle v. Isaac, 456 U.S. 107, 134 (1982). "Decisions as to ... what objections to make ... are generally left to the professional judgment of counsel." State v. Medina, 56 Utah Adv. Rep. 17, 18 (1987) quoting State v. Wood, 648 P.2d 71,91 (Utah 1982). Before the deficiencies enumerated by a defendant will result in reversal it must appear that they were prejudicial, or in other words, that without the errors, there was a reasonable likelihood of a different result. Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983); State v. Forsyth, 560 P.2d 337, 339 (Utah 1977); Jaramillo v. Turner, 24 Utah 2d 19, 22, 465 P.2d 343, 345 (1970); State v. Gray, 601 P.2d 918, 920 (Utah 1979).

In the instant case, given that defendant was found in the area of the crimes carrying a screwdriver and items that were taken from the Frampton's (money, a set of Ford keys and a calculator key chain), there is no reasonable likelihood of a different result if trial counsel had raised the issues defendant complains about. The Frampton's testified that coins and bills were missing from their cars and home (R. 116, 145). Defendant carried $39 in bills (Mrs. Frampton was missing between $30 and $50 dollars) and $2.66 in coin (Jason Frampton was missing an undetermined amount of coin). Mrs. Frampton positively identified the calculator defendant carried at the time of his arrest as hers and matched the Ford key to her own ignition key that was missing from her purse after the burglary (R. 147, 148-150).

Nearly all of the objections and issues defendant now claims could have been raised go to the question of identity.

Given that defendant was found in possession of the missing property, it is unlikely that even it all of the identification evidence had been excluded or impeached defendant would have been acquitted of the crimes charged. Moreover, it is likely that both witnesses would still have been allowed to identify defendant at trial even if their previous identifications were excluded from evidence. Perhaps trial counsel felt, as a matter of strategy, it was best to allow the identifications to come before the jury and use the opportunity to impeach with inconsistencies to reduce the credibility of an anticipated in-court identification. Counsel did raise these inconsistencies before the jury even if she failed to introduce the prior inconsistent statement defendant alludes to. From the record, it is impossible to determine whether the witness had actually made such a statement or whether counsel was merely engaging in artful cross-examination to imply that the testimony was inconsistent with previous statements.

> A lawyer's "legitimate exercise of judgment" in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel.

Codianna, 660 P.2d at 1109 citing State v. McNicol, 554 P.2d 203, 205 (Utah 1976).

Counsel also pointed out to the jury through cross-examination that the officers told the witnesses that they found defendant in the area (R. 125, 168) and that defendant fit the general description they had provided (R. 126, 168). She further brought out the short period of time both witnesses viewed the

person at the time of the crimes and the poor quality of lighting available. These factors could have been used by the jury to discount the victims' identification of defendant in light of the lengthy instruction she offered on the frailties of eye-witness identification that the court gave in substance (R. 101-102).

Defendant also complains that counsel did not ask why fingerprints were not taken at the Trijillo home. She did, however, ask Mr. Trijillo whether prints were taken (R. 169) raising an inference of police neglect and the possibility of an identity error. Had she questioned the officers, their response may have cancelled out the inference by providing a reasonable explanation such as the number of other fingerprints that were already on the door from sources other than the burglar.

Even though counsel may also have objected to the hearsay from Mr. and Mrs. Frampton about what Jason said when he identified defendant that night, this too was non-prejudicial. Jason had already testified about his comments and was thoroughly cross-examined on the issue. His parents' repetition of his comments was merely cumulative at that point and harmless in light of the opportunity to cross-examine the declarant. See California v. Green, 399 U.S. 149, 162 (1970); State v. Nelson, 725 P.2d 1353, 1356 (Utah 1986).

Finally, while Mr. Trijillo's reference to anotner robber who tried to rape his sister was unfortunate, it does not appear that defendant was prejudiced by the reference. From the record, it was clear that the witness was referring to another person and an entirely separate incident in attempting to explain

why he was sleeping on the couch near the sliding glass door that night rather than in his bedroom (R. 156). Since defendant did not gain entry to Trijillo's home and there were no sexually related charges, it does not appear that the jury would have applied the comment to defendant or the circumstances of this case. Had defense counsel objected, she may have focused the jury's attention on the remark and most likely chose to allow them to forget it, if possible.

While it is easy in retrospect for appellate counsel to find things that could have been done differently, the record in this case reveals that defendant received "the skill, judgment and diligence of a reasonably competent defense attorney." Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc). Consequently, defendant is not entitled to a new trial.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm defendant's conviction and deny his request for a new trial.

DATED this 26th day of June, 1987.

DAVID L. WILKINSON
Attorney General

SANDRA L. SJOGREN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 26th day of June, 1987, I caused to be hand delivered four (4) true and exact copies of the above and foregoing BRIEF OF THE UTAH ATTORNEY GENERAL to each of the following counsel of record:

Walter F. Bugden, Jr.
The Judge Building
No. 8 East Broadway
Suite 426
Salt Lake City, Utah 84111

Steven L. Hansen
800 Boston Building
Salt Lake City, Utah 84111